

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

VANESSA RACINE,

Plaintiff,

v.

PHW LAS VEGAS, LLC, and PHW  
MANAGER, LLC

Defendants.

Case No. 2:10-cv-01651-LDG-VCF

**ORDER**

The plaintiff, Vanessa Racine, alleges that she was physically and sexually assaulted by an unidentified man while she was staying at the Planet Hollywood Resort and Casino ("Planet Hollywood"). She brought the instant suit against the defendants, PHW Las Vegas, LLC, and PHW Manager, LLC, ("PHW") as the owners of Planet Hollywood. Racine brings her claim against PHW pursuant to Nevada Revised Statute 651.015, which establishes a duty for innkeepers to protect their patrons from foreseeable harms. Racine is additionally alleging that PHW was grossly negligent, and is seeking punitive damages. Both parties have moved for summary judgment regarding the element of duty under NRS 651.015 (#71 & #75). Racine additionally seeks summary judgment on all remaining elements of NRS 651.015. PHW additionally seeks summary judgment as to

1 Racine's gross negligence claim and her prayer for punitive damages. For the reasons  
2 stated below, the Court will deny Racine's motion, and grant PHW's motion.

3 Background

4 As suggested by the evidence in this case, the Planet Hollywood property includes a  
5 casino, a mall, a hotel with a lobby and rooms located in what the Court will refer to as the  
6 Casino Tower, and a hotel with a lobby and rooms located in what the Court will refer to as  
7 the Westgate Tower, and a parking garage. PHW employs a single security force for the  
8 property, but has separate dispatch offices for the Casino Tower and the Westgate Tower.

9 On June 20, 2010, shortly after 3 a.m., an unidentified man approached Keanna  
10 Alamsahebpour and placed his arm around her waist while she was walking in the mall  
11 area of Planet Hollywood (#70, ¶ 4). Alamsahebpour moved away from the man, entered  
12 the lobby of the Westgate Tower hotel, and described the man and the incident to  
13 someone she believed was a member of the hotel's security staff (#70, ¶ 5). The Court will  
14 refer to this as the Alamsahebpour incident.

15 Shortly thereafter, an unidentified man followed Susan Lee (who was staying in the  
16 same set of adjoining hotel rooms as Alamsahebpour) through the casino and mall. At  
17 about 3:40 a.m., Lee and the man got into a Westgate Tower elevator, and both exited the  
18 elevator on the 56<sup>th</sup> floor. The man followed Lee to her room. Lee told the man to leave  
19 after he inappropriately touched her, and then entered room 5620. About five minutes after  
20 Lee first entered the room, someone (who had not been invited into the room) grabbed  
21 Lee's buttocks from behind, and attempted to push her onto the bed. He subsequently fled  
22 from the room when Lee screamed (#70, ¶ 11, 14; #75, ¶ 31). The Court will refer to this  
23 as the Lee incident.

24 At about 3:46 a.m., the man who had accompanied Lee onto the elevator to the 56<sup>th</sup>  
25 floor got onto the elevator on the 56<sup>th</sup> floor, and took that elevator to the lobby. He then  
26 walked and ran through the lobby area.

1 At about 3:54 a.m., a call was placed from hotel room 5620 in the Westgate Tower  
2 to security in which the caller reported that she and another guest had been sexually  
3 assaulted, and requested the presence of a security officer in their hotel room.

4 At about 3:56 a.m., the man who had accompanied Lee onto the elevator to the 56<sup>th</sup>  
5 floor of the Westgate Tower accompanied another, unknown woman down the escalator  
6 going from the PHW casino area to the valet area, placing his hand on her back while  
7 riding the escalator. The two then sat down and remained in the valet area.

8 At about 3:58 a.m., Security Officer Scott Koss arrived at room 5620, and took  
9 statements from Lee and Alamsahebpour. Alamsahebpour reported that Lee had arrived  
10 at the room 10-15 minutes earlier, and had been followed by and inappropriately touched  
11 by a man. Alamsahebpour further reported that the same man<sup>1</sup> who assaulted Lee had  
12 followed and touched her in the mall. Lee then described her incident with the man to  
13 Officer Koss. At 4:20 a.m., Koss contacted the Las Vegas Metropolitan Police Department  
14 (LVMPD) ( #75, Exhibit E).

15 At about 4:03 a.m., the plaintiff, Vanessa Racine, arrived at Planet Hollywood by  
16 taxi. She wandered around the valet parking area for several minutes. Just prior to 4:10  
17 a.m., Racine got onto an elevator in the Casino Tower. The same man who had  
18 accompanied Lee onto the elevator to the 56<sup>th</sup> floor of the Westgate Tower also got onto  
19 the elevator with Racine, placed his hand on her back, then her hair, and appeared to talk  
20 with Racine. The man exited the elevator with Racine. (#70, ¶ 19-20; #75, ¶ 33). At about  
21 4:35 a.m., the man got onto the elevator in the Casino Tower on the floor of Racine's room,  
22 holding a bag. (#70, ¶ 25; #75, ¶ 31).

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23  
24 <sup>1</sup> While Alamsahebpour acknowledged in her deposition that she had not  
25 personally seen the man during the time he followed and assaulted Lee, the relevant  
26 circumstance is that Alamsahebpour reported to Officer Koss that it was the same man.  
Further, it appears undisputed for purposes of the present motions that the same man  
assaulted both Alamsahebpour and Lee.

1 Racine did not awake until much later that day. She subsequently contacted hotel  
2 security and the LVMPD and reported that she had been sexually assaulted. A  
3 subsequent examination by the Sexual Assault Nurse Examiner showed the presence of  
4 semen on Racine, which semen that did not belong to her boyfriend. (#70, ¶ 32-34; #75, ¶  
5 35). Racine thereafter brought this action against PHW.

6 Standard of Review

7 In considering a motion for summary judgment, the court performs “the threshold  
8 inquiry of determining whether there is the need for a trial—whether, in other words, there  
9 are any genuine factual issues that properly can be resolved only by a finder of fact  
10 because they may reasonably be resolved in favor of either party.” *Anderson v. Liberty*  
11 *Lobby, Inc.*, 477 U.S. 242, 250 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir.  
12 2012). To succeed on a motion for summary judgment, the moving party must show (1)  
13 the lack of a genuine issue of any material fact, and (2) that the court may grant judgment  
14 as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322  
15 (1986); *Arango*, 670 F.3d at 992.

16 A material fact is one required to prove a basic element of a claim. *Anderson*, 477  
17 U.S. at 248. The failure to show a fact essential to one element, however, “necessarily  
18 renders all other facts immaterial.” *Celotex*, 477 U.S. at 323. Additionally, “[t]he mere  
19 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient.”  
20 *United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) (quoting  
21 *Anderson*, 477 U.S. at 252).

22 “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after  
23 adequate time for discovery and upon motion, against a party who fails to make a showing  
24 sufficient to establish the existence of an element essential to that party’s case, and on  
25 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “Of  
26 course, a party seeking summary judgment always bears the initial responsibility of

1 informing the district court of the basis for its motion, and identifying those portions of 'the  
 2 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
 3 affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material  
 4 fact." *Id.* at 323. As such, when the non-moving party bears the initial burden of proving,  
 5 at trial, the claim or defense that the motion for summary judgment places in issue, the  
 6 moving party can meet its initial burden on summary judgment "by 'showing'—that is,  
 7 pointing out to the district court—that there is an absence of evidence to support the  
 8 nonmoving party's case." *Id.* at 325. Conversely, when the burden of proof at trial rests on  
 9 the party moving for summary judgment, then in moving for summary judgment the party  
 10 must establish each element of its case.

11       Once the moving party meets its initial burden on summary judgment, the non-  
 12 moving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. P.  
 13 56(e); *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1103 (9th Cir.  
 14 2000). As summary judgment allows a court "to isolate and dispose of factually  
 15 unsupported claims or defenses," *Celotex*, 477 U.S. at 323-24, the court construes the  
 16 evidence before it "in the light most favorable to the opposing party." *Adickes v. S. H.*  
 17 *Kress & Co.*, 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however,  
 18 will not defeat a well-founded motion. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v.*  
 19 *Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). That is, the opposing party cannot "rest  
 20 upon the mere allegations or denials of [its] pleading' but must instead produce evidence  
 21 that 'sets forth specific facts showing that there is a genuine issue for trial.'" *Estate of*  
 22 *Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting Fed. R. Civ.  
 23 Pro. 56(e)).

#### 24 Cross-Motions for Summary Judgment on Innkeeper Liability

25       To "succeed on a negligence claim for innkeeper liability," a plaintiff must establish  
 26 four elements: "(1) duty, (2) breach, (3) proximate causation, and (4) damages." *Smith v.*

1 *Mahoney's Silver Nugget, Inc.*, 265 P.3d 688, 690 (2011) (citing *Doud v. Las Vegas Hilton*  
 2 *Corp.*, 109 Nev. 1096 (1993)). Both parties move for summary judgment as to the duty  
 3 element. Racine argues that PHW is civilly liable for her injuries under Nevada Revised  
 4 Statute 651.015, which states:

5 1. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse  
 6 or lodging house is not civilly liable for the death or injury of a patron or other  
 7 person on the premises caused by another person who is not an employee  
 8 under the control or supervision of the owner or keeper unless:

9 (a) The wrongful act which caused the death or injury was foreseeable;  
 10 and

11 (b) There is a preponderance of evidence that the owner or keeper did not  
 12 exercise due care for the safety of the patron or other person on the  
 13 premises.

14 2. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse  
 15 or lodging house is civilly liable for the death or injury of a patron or other  
 16 person on the premises caused by another person who is not an employee  
 17 under the control or supervision of the owner or keeper if:

18 (a) The wrongful act which caused the death or injury was foreseeable;  
 19 and

20 (b) The owner or keeper failed to take reasonable precautions against the  
 21 foreseeable wrongful act.

22 The court shall determine as a matter of law whether the wrongful act was  
 23 foreseeable and whether the owner or keeper had a duty to take reasonable  
 24 precautions against the foreseeable wrongful act of the person who caused  
 25 the death or injury.

26 3. For the purposes of this section, a wrongful act is not foreseeable unless:

(a) The owner or keeper failed to exercise due care for the safety of the  
 patron or other person on the premises; or

(b) Prior incidents of similar wrongful acts occurred on the premises and  
 the owner or keeper had notice or knowledge of those incidents.

As both parties recognize, “[t]he preliminary inquiry in any case involving innkeeper  
 liability is whether ‘[t]he wrongful act which caused the death or injury was foreseeable,’  
 and thus, whether a duty of care was owed to the plaintiff.” *Smith*, 265 P.3d at 692 (citing  
 NRS 651.015(2)(a)). The court makes this determination as a matter of law. *Id.* Pursuant  
 to NRS 651.015(3), the court “evaluate[s] evidence of ‘[p]rior incidents of similar wrongful  
 acts’ or any other circumstances related to the exercise of ‘due care’ when imposing a duty  
 under NRS 651.015(2).” *Id.*, at 692. The “due care” language allows the court “to consider

1 other circumstances regarding the basic minimum precautions that are reasonably  
2 expected of an innkeeper.” *Id.*, at 691. As further noted by the Nevada Supreme Court in  
3 *Smith*, “[t]he legislative history of NRS 651.015(3)(a) likewise indicates that the  
4 circumstances surrounding the commission of a wrongful act may provide the requisite  
5 foreseeability for imposing a duty even where no prior incidents of similar wrongful conduct  
6 have occurred on the premises.” *Id.*, at 693.

7 For purposes of determining foreseeability, the Court assumes that the same man  
8 assaulted Alamsahebpour in the mall and followed Lee through the mall and to her room  
9 on the 56<sup>th</sup> floor of the Westgate Tower at about 3:40 a.m. He assaulted Lee in her room,  
10 and was then recorded getting onto an elevator on the 56<sup>th</sup> floor at 3:46 a.m. At 3:56 a.m.,  
11 he was recorded descending an escalator to the PHW valet area, in the company of an  
12 unidentified woman. At some time no earlier than 3:58 a.m, Alamsahebpour notified PHW  
13 that a man had assaulted both her and Lee. The man then sexually assaulted Racine in  
14 her room after following her onto an elevator in the Casino Tower at about 4:10 a.m.

15 Initially, the Court concludes that Racine has not shown that there were prior  
16 incidents of similar wrongful acts that rendered foreseeable the wrongful act against  
17 Racine. As argued by Racine, the attacker’s wrongful act, as it concerned Racine, was to  
18 follow her into an elevator, follow her off the elevator, and then follow her into her room  
19 where he sexually assaulted her. None of the incidents identified by Racine in her moving  
20 papers at pages 16-18 concern an individual following a guest into her room to commit a  
21 sexual assault, or concern an individual following a guest into his or her room to commit  
22 any act of violence or other wrongful act. As understood by this Court, the “prior incidents”  
23 inquiry under NRS 651.015 requires a determination whether a pattern exists of similar  
24 incidents, and whether the incidents establishing this pattern were known to the innkeeper.  
25 The knowledge of such a pattern of incidents places the innkeeper on notice of a particular  
26 set of circumstances that increase the likelihood of further similar incidents. This

1 knowledge imposes a duty on the innkeeper to take reasonable precautions to alter those  
2 circumstances so as to protect patrons against the foreseeable wrongful act. As an  
3 example, a pattern of violent crimes in a particular area of an innkeeper's property (a dark  
4 corner of the garage) would render foreseeable that further violent crimes would occur in  
5 that particular area. By contrast, and using as an example a prior incident offered by  
6 Racine, a single incident of a battery against a couple taking pictures in the lobby does not  
7 render foreseeable the act of another individual following a guest into a room to commit a  
8 violent crime. Similarly, an incident of an individual forcing a victim from Las Vegas  
9 Boulevard into the Planet Hollywood garage to commit a violent crime is not similar to the  
10 wrongful act alleged in this case. The closest Racine comes to identifying prior incidents of  
11 similar wrongful acts is her identification of two separate, apparently unrelated, prior  
12 incidents in which a male approached a female at an unidentified (but apparently public)  
13 location in Planet Hollywood, and reached under the female's dress to insert his finger into  
14 her vagina. Though both incidents involved sexual assaults, the location of each of the  
15 events was in a public area, and the nature of the sexual assault was distinct from the  
16 wrongful act against Racine. These prior sexual assaults did not inform PHW of a set of  
17 circumstances indicating an increased likelihood of individuals following guests into their  
18 rooms to commit sexual assaults or other violent crimes. In sum, the prior incidents  
19 identified by Racine did not make foreseeable the attack against her.

20 In the foregoing determination of foreseeability under NRS 651.015(3)(b), the Court  
21 has not considered the Alamsahebpour and Lee incidents for several reasons. First,  
22 Racine has not argued that the Alamsahebpour and Lee incidents were "prior incidents of  
23 similar wrongful acts." Second, as suggested in *Smith*, given that the Alamsahebpour and  
24 Lee incidents occurred immediately prior to the attack on Racine, and given that they  
25 involved the same individual that attacked Racine, it would appear to the Court that they  
26 are appropriately considered as part of the circumstances surrounding the commission of



1 the wrongful act committed against Racine, and thus should be considered under NRS  
2 651.015(3)(a). Third, even if the Alamsahebpour and Lee incidents are considered “prior  
3 incidents of similar wrongful acts,” under subsection 3(b), the facts of those prior incidents  
4 that appear relevant to the Court under 3(b) are the same facts that appear relevant to the  
5 Court as circumstances to be considered under subsection 3(a), including the circumstance  
6 that all incidents were committed by the same individual within a short period of time.  
7 Whether the Court considers the Alamsahebpour and Lee incidents under 3(a) or (b), the  
8 Court would apply the same analysis to determine whether, as a matter of law, those  
9 incidents rendered the man’s subsequent attack on Racine foreseeable to PHW.

10 In considering the circumstances of the Alamsahebpour and Lee incidents to  
11 determine whether the assault of Racine was foreseeable to PHW, the Court is mindful that  
12 foreseeability is not to be determined with the benefit of hindsight. Racine’s arguments and  
13 characterization of the evidence, however, rely upon hindsight. For example, in presenting  
14 her arguments, Racine asserts that security was contacted by room 5620 at 3:54 a.m., and  
15 advised that a guest in that room had been sexually assaulted. She then asserts that “the  
16 attacker from room 5620 is seen on the video evidence getting on the elevator from the 56<sup>th</sup>  
17 floor after attacking that guest, and then ‘sprinting’ out of the elevator.” She further asserts  
18 that the attacker is seen on an escalator going toward valet parking at 3:56 a.m., and that  
19 this was at a time when PHW “should have been on the lookout for the suspect.” Racine  
20 further asserts the “attacker’s whereabouts is tracked for the entire time between 3:56 a.m.  
21 and the time he attacked Racine,” and that this same video footage was at the fingertips of  
22 the security department in real time. She notes that the man “lurk[ed] around the valet  
23 parking area . . . (all on video),” after which he followed Racine, and is “seen in an elevator  
24 at the same time as her at 4:09:58. She concludes that this was 16 minutes after security  
25 had received the call of a sexual assault from room 5620.

1 The Court, however, will not consider the events with the benefit of hindsight.  
2 Rather, the Court finds that PHW received a report from Alamsahebpour in the early  
3 morning hours of June 20, 2010, in the lobby of the Westgate Tower regarding an incident  
4 in the mall.<sup>2</sup> She “let security<sup>3</sup> in the hotel know at that time there was a strange man in the  
5 mall area that had grabbed [her] unsolicited. And [she] said to keep an eye out for him,  
6 because he was very strange. His behavior was weird.” Alamsahebpour Deposition, p. 18,  
7 ll. 14-19.

8 At about 3:54 a.m., a person from room 5620 of the Westgate tower called PHW  
9 security and reported that she and another person had been sexually assaulted. The call  
10 was received by Officer Koss of PHW’s security, who was working in the dispatch office for  
11 the Westgate Tower. The caller requested the presence of a security officer. The record  
12 lacks any evidence that, during the phone call, PHW received any information indicating  
13 where the sexual assaults had taken place, describing when the assaults had taken place,  
14 describing the person (or persons) who had committed the assaults, or providing any other  
15 information regarding the assaults.<sup>4</sup>

16 At about 3:58 a.m., Officer Koss arrived at room 5620. As described in Officer  
17 Koss’s report, he initially spoke with Alamsahebpour who reported that Susan Lee, who

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18  
19 <sup>2</sup> Alamsahebpour could not recall when this incident took place, but estimated  
that it occurred 20 or 30 minutes before the Lee incident.

20 <sup>3</sup> Alamsahebpour’s deposition indicates that she may not have reported the  
21 incident to a security officer. She explained: “I think it was more of, like, there were people  
22 there, like, opening doors, and I let one of them know, like some staff of the hotel that was  
wearing a wire that was standing in the lobby.” Alamsahebpour Deposition, p. 19, ll. 2-6.  
23 Whether or not she reported the incident to a security officer, the Court assumes that  
Alamsahebpour reported the incident to PHW, and thus that PHW had notice of this  
incident.

24 <sup>4</sup> In her deposition, Alamsahebpour testified that a number of individuals were  
25 present (presumably in room 5622) when Lee described what had just happened in room  
5620, that it was a “group decision” to call security, but could not recall who made the call  
26 to security. She also could not recall whether a description of the man was made during  
the phone call.

1 had arrived in the room 10-15 minutes earlier, had been followed and inappropriately  
2 touched by a man. Alamsahebpour then informed Officer Koss that she had seen the  
3 same man in the mall,<sup>5</sup> that he had touched her abdomen,<sup>6</sup> and that she had informed the  
4 man to not touch her and to get away from her. The man had then walked past her and  
5 through the mall. Alamsahebpour described the man according to his ethnicity (as she  
6 perceived it),<sup>7</sup> and as wearing a grey button-up polo shirt, blue jeans, and having short hair.  
7 (#70, ¶ 15-16; #75, ¶ 32).

8 Officer Koss then talked with Lee. Lee described having been lost in the mall, and  
9 that a man had approached her. She told the man that she was lost. Lee further informed  
10 Officer Koss that the man escorted Lee through the mall, and Lee told the man she was no  
11 longer lost. The man continued to follow her. She went into a restroom and waited for ten  
12 minutes hoping the man would leave. When she left the restroom, however, he was still  
13 waiting for her and followed her onto the elevator in the lobby. He exited the elevator with  
14 her on the 56<sup>th</sup> floor, and followed her to her room. The man inappropriately touched her,  
15 and Lee told him to stop. She then entered room 5620, and went into the adjoining room  
16 (5622) to the kitchen area to eat. Lee then informed Koss that when she returned to room  
17 5620 (after about 5 minutes), someone grabbed her from behind, and began groping her.

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19 <sup>5</sup> Alamsahebpour acknowledged in her deposition that she did not personally  
20 see the man who had assaulted Lee, but rather that she had come to the realization that it  
21 was the same man when Lee described the man following his assault on Lee. As relevant  
to the present motion, however, Alamsahebpour reported that she had been assaulted by  
the same man that assaulted Lee.

22 <sup>6</sup> In her deposition, Alamsahebpour testified that the man had grabbed her  
23 around the waist, but otherwise had not touched her in any other inappropriate manner.  
Alamsahebpour Deposition, p. 18, l. 7; p. 23, ll 23-25.

24 <sup>7</sup> In his report, Officer Koss indicated that Alamsahebpour identified the man as  
25 Asian. In her deposition, Alamsahebpour stated: "he was, like, almost like Asian and  
26 Hispanic. I couldn't – he seemed sort of Asian, but he had dark skin. And he looked like  
he could be Hispanic or Native American also." Alamsahebpour Deposition, p. 21, ll. 19-  
22.

1 Lee screamed, “causing the [man] to run out the door, and to the elevators.” Lee described  
2 the man as having the same perceived ethnicity as described by Alamsahebpour, and  
3 wearing a grey shirt and blue jeans.

4 Officer Koss’s report does not identify the exact time Alamsahebpour and Lee  
5 provided each item of information that he recorded in his report, or when he received their  
6 descriptions of the man. However, Officer Koss’s report indicates he had asked Lee if she  
7 would like to file a report with the Las Vegas Metropolitan Police Department, that Lee had  
8 accepted, and that the LVMPD were notified at approximately 4:20 a.m.

9 An additional fact known to PHW at that time was that it had two video surveillance  
10 systems<sup>8</sup> that recorded video images being captured by cameras at various locations  
11 throughout the PHW property. The record lacks evidence as to when PHW first reviewed  
12 any of this security video. The record presented to this Court also lacks any evidence that  
13 any of the recordings significant to this action were displayed or seen on a monitor “in real  
14 time,” i.e., at the time the event recorded was occurring.

15 The video surveillance systems recorded video of the following events, which are  
16 significant to the present matter. These events occurred at the time the recordings were  
17 made. At about 3:46:45 a.m., before any call was made from room 5620 to security, one of  
18 PHW’s video surveillance systems recorded a man getting onto the elevator on the 56<sup>th</sup>  
19 floor of the Westgate Tower. Having reviewed the video recordings, the Court notes that  
20 this video recording does not reveal the man’s actions just prior to the recording. Nor does  
21 the video recording, by itself, allow a determination that the man was a “predator,” or an  
22 “attacker.” A person viewing the video as it was being recorded would have described the  
23 video as depicting a man (not a predator, or an attacker) getting onto an elevator on the  
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25 <sup>8</sup> The video evidence submitted to the Court reflects that PHW had at least two  
26 different video surveillance systems, and that the recordings made by one of the systems  
was of much lower quality than the other.

1 56<sup>th</sup> floor. The remainder of the elevator video also lacks any indication of the man's  
2 actions prior to getting on the elevator. The video recorded the man as he pushed the  
3 button, as he then stepped back and appeared to check his phone, as he stood in the  
4 elevator while it descended, and as he moved forward to the elevator door.

5 The elevator camera also recorded the man walking off the elevator at about  
6 3:47:30 a.m. By 3:47:33, the man left the elevator camera's field of view.<sup>9</sup> Starting at  
7 about 3:47:31, a second camera, one directed at the elevator area of the lobby, also  
8 recorded the man walking off the elevator. This second camera continued to record him as  
9 he walked away from the elevator, and roughly toward the camera's location, until about  
10 3:47:40. At that time, the man left the second camera's field of view to the bottom of that  
11 view. Starting at about 3:47:38, a third camera (recording the lobby/concierge desk),  
12 captured the man as he entered the field of view from the left, walking and moving  
13 diagonally across the screen toward the upper right. By 3:47:40, the man walked behind  
14 one of several pillars blocking the camera's field of view. The camera recorded the man as  
15 he reappeared from behind the pillars at the top of the camera's field of view at about  
16 3:47:53, and continued to walk in the camera's field of view. The man again walked behind  
17 other pillars obstructing the camera's field of view at 3:47:57. At about 3:48:08, the video  
18 system recorded the man entering, from the bottom, the field of view of a fourth camera.  
19 The camera continued to record him as he walked diagonally across the field of view, away  
20 from the camera, toward the upper-right corner of the camera's field of view. While in the  
21 field of view of this fourth camera, the man is recorded as he begins running at about  
22 3:48:12. The camera continued to record the man running until he exited the camera's  
23

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24 <sup>9</sup> The plaintiff has represented to the Court that the video surveillance also  
25 recorded, at 3:40:42 a.m., this same man getting onto the elevator in the lobby of Westgate  
26 Tower with Lee, and exiting with her on the 56<sup>th</sup> floor. This video was not provided to the  
Court, but the Court assumes for purposes of the motion that the video depicts the scene  
as described by the plaintiff.

1 field of view at about 3:48:14. Almost immediately, at about 3:48:15, a fifth camera began  
2 recording the man as he entered, in the act of running, at the bottom of the fifth camera's  
3 field of view. That camera continued to record him as he moved away from the camera,  
4 toward the top of its field of view. At about 3:48:20, the camera recorded the man as he  
5 stopped running and began walking again. The man continued to walk until out of the  
6 camera's field of view at about 3:48:30.

7       Eight minutes later, at about 3:56:33 a.m. (and two minutes before Alamsahebpour  
8 and Lee would begin describing the man and their incidents to Officer Koss), a different  
9 PHW video surveillance system recorded the man from behind as he descended an  
10 escalator. The man entered the camera's field of view from the bottom of its field of view,  
11 as he stepped onto the escalator. As the camera recorded the man descending the  
12 escalator, he was moving away from the camera's position. The camera also recorded a  
13 woman who appeared to be accompanying the man. While in the camera's field of view,  
14 and while on the escalator, the man placed his hand on the woman's back, and the man  
15 and woman appeared to act as if they already know each other. This camera continued to  
16 record the man and woman until about 3:57, when they exited the escalator. A camera  
17 with a field of view directed towards the bottom of the escalator recorded the man and  
18 woman exit the escalator at about 3:57, and promptly leave the field of view. A third  
19 camera, with a field of view covering the valet area, shows these two persons entering the  
20 valet area (apparently from the area at the bottom of the escalator), walk across the valet  
21 area, and then appear to sit down together. As best as the Court can tell, given the low  
22 quality of the video, the two remained sitting together until the video submitted into  
23 evidence ends at just before 4:06 a.m.

24       In the seconds just prior to 4:10 a.m., PHW's video surveillance system recorded the  
25 man getting onto an elevator with the plaintiff. A camera on that elevator also recorded the  
26 man getting onto the elevator with Racine, and then exiting the elevator with her.

1 Racine argues that PHW was on “actual notice” that there was a predator on their  
2 property, had a description of the predator, and had recorded camera coverage of the  
3 areas where the attacker was located. She further provides the following characterizations  
4 of events and evidence: “the attacker from room 5620 is seen on the video evidence  
5 getting onto the elevator,” “the attacker is seen on the Planet Hollywood Casino escalator,”  
6 “the attacker’s whereabouts is tracked for the entire time between 3:56 a.m. and the time  
7 he attacked Plaintiff Racine.” The argument, and characterization of the evidence, appears  
8 to recognize that the critical circumstance in determining whether the man’s attack against  
9 Racine was foreseeable was whether PHW knew, or should have known, that the man who  
10 descended the escalator to valet parking at 3:56:30, and who then remained in valet  
11 parking until just prior to 4:10 a.m., was either “an attacker” or “the attacker.”

12 The Court does not disagree that the man who grabbed Alamsahebpour’s waist, and  
13 who attacked Lee in her room, can be labeled as an attacker. The reports given by  
14 Alamsahebpour and Lee would establish, at the time the reports were given, that each was  
15 attacked by a man, an “attacker.” Further, that the same man was involved in both  
16 incidents indicates an increased likelihood that the man would engage in further  
17 inappropriate conduct against woman.

18 That the man can be described as an attacker by those aware of his acts against  
19 Alamsahebpour and Lee does not, however, establish that the man would be recognized,  
20 or “seen,” or “tracked” as an attacker by someone unaware of the man’s prior conduct.  
21 The only conduct of the man recorded on video that Racine suggests is indicative of the  
22 man’s attack on Lee is that he broke into a run in the lobby. The video also shows that he  
23 maintained the run only briefly, and then returned to a walk. The Court cannot agree that a  
24 person observing the Westgate lobby at 3:48 a.m., (a time prior even to the call first  
25 reporting generally the Lee incident) would have recognized the man as “an attacker”  
26 because he briefly broke into a run. A person observing the Westgate Tower elevator at



1 3:46 a.m. would not have recognized that the man getting on the elevator on the 56<sup>th</sup> floor,  
2 and pushing a button for the lobby, was “an attacker.” A person observing the escalator  
3 descending from the PHW casino to the valet area at 3:56 a.m., in the company of a  
4 woman that the man appeared to know, would not have recognized the man as “an  
5 attacker.” Further, while the call had already been made at 3:54 a.m. from room 5620 to  
6 security that reported a sexual assault had occurred, an observer with knowledge of that  
7 call would not have recognized the man descending the escalator as “the attacker.” The  
8 man’s conduct, as recorded in the video, does not identify him as either “an attacker” or  
9 “the attacker.”

10 While Racine argues that “the attacker’s whereabouts is tracked for the entire time  
11 between 3:56 a.m. and the time he attacked Plaintiff Racine,” the record does not support  
12 this characterization. Racine’s argument concerns the three recordings made starting at  
13 3:56:30 a.m. of the man descending the escalator, exiting the escalator and entering valet,  
14 and of the valet area. PHW did not receive a description of the man, a description that  
15 would allow a person aware of the description to identify the man as “the attacker,” until  
16 some time between 3:58 a.m. and 4:20 a.m. Officer Koss’s report does not indicate when  
17 he received Alamsahebpour’s and Lee’s descriptions, though his report suggests it was  
18 after 3:58 (when he first arrived in room 5620) and before 4:20 a.m. (when LVMPD were  
19 notified). The only other witness to the timing as to when PHW received the descriptions  
20 was Alamsahebpour. In response to a leading question suggesting the description  
21 occurred at the beginning of her interactions with security, she testified that she didn’t  
22 remember the sequence of events once security arrived at the room, but “[felt] that the  
23 description of him was probably first.” Alamsahebpour Deposition, p. 42, ll 2-7.<sup>10</sup> However,

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24  
25 <sup>10</sup> Alamsahebpour’s lack of recall of specifics of the visit is further exemplified by  
26 her initial testimony that she was not shown a photograph of the man at some point in time  
while PHW security was in the room. Racine’s counsel attempted to refresh  
Alamsahebpour’s memory by showing her the written statement she made for LVMPD, in



1 even assuming Alamsahebpour and Lee both described the man to PHW immediately after  
2 Officer Koss arrived at room 5620, that description would not have been available to a  
3 person observing the escalator at 3:56 a.m., or the exit of the escalator and the entrance of  
4 valet parking at 3:57 a.m. Further, a person who began observing the images then being  
5 recorded by the valet area camera at 3:58 a.m., (ie, the earliest any person observing that  
6 recording would have had a description of the man) would not have “seen” or “tracked”  
7 either the described man or “the attacker. By 3:58 a.m., the man had already entered the  
8 valet area and moved to a location where he appears to sit down. As a result of the quality  
9 of the video recording, the camera’s location, and the location where the man sat down,  
10 even the most careful review of the video that was recorded at 3:58 a.m. does not permit  
11 the conclusion that the man, “the attacker,” was then in the valet area. The same is true of  
12 the remaining video of the valet area submitted to the Court. Thus, while it is true that the  
13 man’s presence in valet can now be “tracked” from 3:58 through at least 4:06 a.m., such  
14 “tracking” is only possible with the benefit of hindsight. The video evidence submitted to  
15 the Court requires a conclusion that a person who began observing the recording being  
16 made by the valet camera immediately after learning the man’s description (ie, no earlier  
17 than 3:58 a.m.) would not have been able to recognize that “the attacker” was in that  
18 camera’s field of view.

19 Thus, while Racine suggests the man was seen and tracked after attacking Lee, the  
20 evidence establishes only that PHW possessed recordings made by its video surveillance  
21 systems from which some of the man’s movements, and his location at certain times, can  
22 be reconstructed. PHW’s possession of the recordings made by its surveillance systems  
23

24 \_\_\_\_\_  
25 which Alamsahebpour stated that “[t]he man at security showed me their picture, looked  
26 exactly the same as the man I encountered in the mall.” Despite this attempt to refresh  
Alamsahebpour’s memory, she conceded: “Honestly, I don’t remember seeing a picture,  
but if I said it, I’m sure that I did.”

1 during the time period between the Lee incident and the attack on Racine did not render  
2 foreseeable the attack against Racine.

3 Racine also argues that the video surveillance recordings were not immediately  
4 reviewed. In light of her other arguments, she appears to be arguing that even if PHW did  
5 not actually know the man remained on the property, it should have known that he  
6 remained on the property. Racine has not shown, however, that a meaningful review of the  
7 surveillance recordings could have started early enough such that a reasonable review  
8 would have disclosed (before 4:10 a.m.) that the man was still present on PHW's property.  
9 Officer Koss did not begin to obtain information allowing a meaningful review of the video  
10 evidence from Alamsahebpour and Lee until after 3:58 a.m. Further, even when construed  
11 in the light most favorable to Racine, the evidence suggests that, in reviewing the video,  
12 the first video in which the man could have been readily identified would have been the  
13 video recording of the man getting onto the elevator on the 56<sup>th</sup> floor of the Westgate  
14 Tower at 3:46:45 a.m. That this video could have been quickly recognized as a likely  
15 recording of the man who had attacked Lee would have been suggested (though not  
16 established) by the circumstances of its time and location, which would have been  
17 consistent with the reports Officer Koss received of the attack against Lee. Racine,  
18 however, offers no evidence as to the minimum amount of time that would have been  
19 necessary to identify the video recording of the man getting onto the elevator at 3:46:45 as  
20 a recording of the man who had assaulted Lee. Further, the timing of the video would have  
21 revealed that PHW was attempting to locate a man who had left the location of the attack  
22 at least twelve minutes prior to PHW getting a description of that man.

23 Reviewing the video recordings to confirm that the man seen at 3:46:45 a.m. was  
24 the man who had attacked Lee, for example, by identifying and reviewing the 3:40 a.m.  
25 video of Lee and the man ascending in the elevator to the 56<sup>th</sup> floor together, would have  
26

1 required additional time. However, Racine offers no evidence, or argument, of the  
2 necessary, and minimum, additional time required to accomplish this confirmation.

3 Racine has shown that PHW's video surveillance systems would have allowed PHW  
4 to reconstruct the man's movements (and thus location) from 3:46:43 a.m. until about  
5 3:48:35 a.m., as the man moved through five adjacent areas, each area being recorded by  
6 a different camera. This reconstruction of the man's movement (by tracking him from one  
7 location to the next) would have further indicated, at one point, and for a short period of  
8 time, he ran away from the Westgate Tower. As previously noted, however, this  
9 reconstruction of the man's movements could not have commenced until after 3:58, and  
10 could not have started until someone had first identified the 3:46:45 a.m. elevator recording  
11 as having captured images of the man who attacked Lee. Racine offers no evidence as to  
12 the necessary, and minimum, amount of additional time that would be required for a review  
13 of the video surveillance that would have only established (a) the man's location at 3:48:35  
14 a.m., and (b) that the man was leaving that location at 3:48:35 a.m.

15 Further, even assuming the reconstruction of the man's 3:46:45 through 3:48:35  
16 a.m. movements could have been completed prior to 4:10 a.m., the additional information  
17 resulting from this review of the video evidence would not have rendered foreseeable the  
18 attack on Racine. The additional information revealed in these video recordings did not  
19 indicate that the man decided to remain on the property after his attack on Lee had been  
20 ended by her screams. Rather, the additional information would have established only that  
21 two minutes after the Lee incident, and ten minutes before PHW started receiving  
22 meaningful information regarding the assault and a description of the man, the man was  
23 walking and running away from the location of the incident. While the Court disagrees with  
24 Racine that the man's act of running revealed him as an attacker, an observer with  
25 knowledge of the attack (ie, an observer after 3:58 a.m.) would have witnessed an act  
26 (running away) consistent with a man leaving a location as quickly and entirely as possible.

1 Rather than establishing foreseeability, the reconstruction of the man's movements through  
2 3:48:35 a.m. would have suggested the opposite; that it was foreseeable that the man had  
3 left the property.

4 More critically, however, starting at 3:48:35 a.m., and continuing until about 3:56:30  
5 a.m., PHW's video surveillance systems did not record the man's movements and  
6 location.<sup>11</sup> Further review of the surveillance recordings made subsequent to 4:38:35 do  
7 not allow a nearly seamless reconstruction of the man's movement, second-by-second, as  
8 he moved away from the Westgate Tower and through adjacent areas of the property. Any  
9 review of video recorded during this time would as likely suggest that the man had left the  
10 property, consistent with his last reconstructed movements prior to 4:38:35 a.m.

11 A different PHW surveillance system next recorded the man nearly eight minutes  
12 after the last prior recording of the man, when he was descending the escalator at 3:56:30  
13 a.m. Racine does not offer any evidence as to the necessary, and minimum, amount of  
14 time that PHW would have required to not only locate that particular recording but to also  
15 recognize its significance as a recording of the man. The Court cannot find the attack  
16 against Racine was foreseeable to PHW based solely on evidence that it is now *possible* to  
17 establish, from recorded video, that the man remained on the property after the Lee  
18 incident. That PHW's surveillance system recorded the man's location at 3:56:30 a.m.,  
19 does not establish that PHW could have identified and recognized the significance of the  
20 3:56:30 recording before 4:10 a.m.<sup>12</sup> Accordingly, the Court finds that, before the man

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21  
22 <sup>11</sup> The alternative explanation is that the man's location was recorded during  
23 this period by some cameras but, despite the time available since the incident, poor video  
quality or other circumstances have precluded the identification of the man in any other  
video recording during this period.

24 <sup>12</sup> The Court is further mindful that, in the 3:56:30 video, the man appears in a  
25 context inconsistent with the context recorded in the 3:46:43 to 3:48:35 sequence. Rather  
26 than depicting an unaccompanied man walking, and sometimes running, through the  
Westgate Tower lobby, the 3:56:30 video depicts a man accompanied by a woman with  
whom he appears acquainted. Racine has not offered evidence as to how, prior to 4:10

1 attacked Racine in her room, PHW did not know, and could not have known, that the man  
2 who attacked Lee, and who stopped that attack in response to Lee's screams, and who  
3 had run from her room and to the elevator, had not fled the PHW property.

4 In sum, for purposes of determining foreseeability, the wrongful act against Racine  
5 was that a man she did not know followed her into her room at about 4:10 a.m., and then  
6 sexually assaulted her in her room. The record lacks evidence of prior incidents of similar  
7 wrongful acts.

8 The circumstances of the sexual assault of Racine include Alamsahebpour's report  
9 to PHW, sometime before 3:30 a.m., that a man had inappropriately touched her while she  
10 was in the mall area. Alamsahebpour's first oral report to PHW did not make foreseeable  
11 the sexual assault of Racine. At 3:54 a.m., PHW received a call notifying PHW that the  
12 female caller and another guest had been sexually assaulted. The record lacks any  
13 evidence that PHW received any further information during the call. This call did not make  
14 foreseeable the sexual assault against Racine. Beginning at 3:58 a.m., PHW was again  
15 notified of the details the Alamsahebpour incident, and was notified in the first instance of  
16 the details of the Lee incident. PHW was also informed that the same man was involved in  
17 both incidents, and received Alamsahebpour's and Lee's description of the man. PHW  
18 also learned that the Lee incident had occurred 5 or 10 minutes before PHW received the  
19 call reporting the sexual assault of the caller and another guest. PHW also learned that the  
20 Lee incident ended when Lee screamed, and the man ran from the room and to the  
21 elevator. The information received by PHW did not make foreseeable that, following the  
22 attack on Lee, the man would remain on PHW's property. Rather, the information would  
23 have indicated an increased likelihood that the man would have quickly left the property  
24

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25 a.m. and without the benefit of any knowledge gained after 4:10 a.m., PHW could have  
26 identified the 3:56:30 recording as depicting the man, despite the apparent additional  
presence of a female companion.

1 entirely. The information provided to PHW beginning no earlier than 3:58 a.m. did not  
2 make foreseeable the sexual assault against Racine.

3 Prior to the assault against Racine, PHW's video surveillance systems recorded  
4 various locations of PHW's property. Some of the recordings depicted the man who had  
5 assaulted Alamsahebpour and Lee. PHW's possession of the recordings from its video  
6 surveillance systems that depicted the man did not make foreseeable the sexual assault of  
7 Racine.

8 The record suggests it is extremely unlikely that PHW could have commenced a  
9 meaningful review of its video surveillance recordings prior to the sexual assault against  
10 Racine. Further, even assuming a meaningful review of PHW's video surveillance  
11 recordings could have started prior to 4:10 a.m., the record precludes a conclusion that  
12 such a review could have disclosed (before 4:10 a.m.) that the man had not left the PHW  
13 property after his assault on Lee. Rather, the first video recordings likely to have been  
14 reviewed would have depicted the man leaving the location of the sexual assault against  
15 Lee by both walking and running. This video evidence, even if its significance could have  
16 been ascertained prior to 4:10 a.m., would not have rendered foreseeable the sexual  
17 assault against Racine. (Rather, this video sequence would have suggested the man was  
18 in the process of leaving the property at 3:48 a.m., 6 minutes before PHW first received  
19 any notification concerning the man's assault of Lee, and at least 10 minutes before PHW  
20 received any details of that assault, including a description of the man.)

21 PHW's video surveillance system recorded the man's location starting at 3:56:30  
22 a.m. The record, however, lacks any evidence that such a review of the recordings made  
23 by PHW's video surveillance systems that would have resulted in recognizing the  
24 significance of the 3:56:30 a.m. recording of the man could have been completed prior to  
25 4:10 a.m. PHW's video surveillance system continued to record the man's presence in the  
26 valet area until at least 4:06 a.m. Due to the circumstances of that recording (poor quality,

1 location of camera, location of man), the significance of the valet area recording requires  
2 first identifying the significance of the 3:56:30 and the 3:57 video recordings of the man  
3 descending and exiting the escalator to the valet area. PHW's possession, prior to 4:10  
4 a.m., of these video surveillance recordings does not render foreseeable his wrongful act  
5 against Racine. Racine has not shown that a meaningful review of PHW's video  
6 surveillance recordings could have resulted in identifying the significance of the 3:56:30  
7 and the 3:57 a.m. recordings prior to 4:10 a.m.

8 PHW was notified of the details of the assault against Lee, including a description of  
9 her attacker, beginning at 3:58 a.m. Racine seeks a determination, as a matter of law, that  
10 PHW had a duty to protect her from the attack against her that began twelve minutes later.  
11 At its essence, she seeks a determination as a matter of law that PHW had a duty, to be  
12 completed within twelve minutes, of identifying, locating, and apprehending the man who  
13 had fled from room 5620 eight minutes before PHW first received any notice of the attack  
14 against Lee. Any such duty, however, arises only if the sexual assault of Racine was  
15 foreseeable (as a matter of law) because of a failure to exercise due care; a failure to  
16 engage "in the basic minimum precautions that are reasonably expected of an innkeeper."  
17 *Smith*, 265 P.3d at 691. This determination is made in the context of the totality of the  
18 circumstances. As relevant to a determination of whether the sexual assault of Racine was  
19 foreseeable to PHW, those circumstances occurred during the sixteen minutes between  
20 the first call and the attack of Racine, and more critically, during the twelve minutes after  
21 PHW first received a description of the man, and the sexual assault of Racine. The  
22 circumstances that occurred, or that could have occurred, did not and could not have  
23 rendered the sexual assault of Racine foreseeable to PHW.

24 The Court's conclusion, as a matter of law, that the sexual assault against Racine  
25 was not foreseeable rests upon a consideration of all circumstances (including all  
26 circumstances of both the Alamsahebpour and Lee incidents, and all the video surveillance

1 recordings that have been submitted to the Court) both individually and in totality.

2 Therefore, the Court will grant the defendant's motion for summary judgment as to the duty  
3 element of NRS 651.015, and will deny the plaintiff's motion for summary judgment.

4  
5 Planet Hollywood's Motion for Summary Judgment on Gross Negligence

6 The Ninth Circuit has held that "[w]hat is 'gross' in the particular case is a matter of  
7 fact that must be left to the determination of the reasonable persons making up the trier of  
8 fact." *Chemical Bank v. Security Pacific Nat. Bank*, 20 F.3d 375 (9th Cir. 1994). This is  
9 particularly true when "witness credibility . . . is clearly at issue, especially in view of the fact  
10 that the only evidence submitted is the testimony of the defendant and of experts." *F.D.I.C.*  
11 *v. Jackson*, 133 F.3d 694 (9th Cir. 1998) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d  
12 497, 507 (9th Cir. 1992)). Nevertheless, "Rule 56(c) mandates the entry of summary  
13 judgment, after adequate time for discovery and upon motion, against a party who fails to  
14 make a showing sufficient to establish the existence of an element essential to that party's  
15 case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v.*  
16 *Catrett*, 477 U.S. 317, 322 (1986).

17 In the instant case, both parties cite to various statements made by their respective  
18 security experts to argue that PHW's efforts after learning of the first alleged assault were  
19 or were not reasonable. Ken Braunstein, a security expert retained by Racine, drafted a  
20 report dated Dec. 3, 2012, included with Racine's motion for summary judgment, in which  
21 he concluded:

22 [PHW] has not trained its' security officers, surveillance personnel or its' other  
23 personnel, including supervisors, to understand when guests are too  
intoxicated to protect themselves from harm from others.

24 I believe that with proper training and supervision, and an adequate number  
25 of personnel to protect its guests, the injury to a highly intoxicated female  
[Racine] . . . would not have occurred.  
26 (Exhibit M).



1           Braunstein thereafter submitted a supplement to his report, dated Apr. 28, 2013,  
2   wherein he concluded:

3           It is my further opinion . . . that the failure to have current, professional  
4           policies and procedures, to properly train and supervise its' security officers  
5           to protect its guests, and to not have sufficient security personnel on duty,  
6           more likely than not, could have prevented the rape of Miss Racine."  
7           (Exhibit N).

8           Both parties cite to *Hart v. Kline*, 61 Nev. 96 (1941) for Nevada's definition of gross  
9           negligence. In *Hart*, the Supreme Court of Nevada adopted the definition of the Supreme  
10          Court of Vermont, which stated:

11          Gross negligence is substantially and appreciably higher in magnitude and  
12          more culpable than ordinary negligence. Gross negligence is equivalent to  
13          the failure to exercise even a slight degree of care. It is materially more want  
14          of care than constitutes simple inadvertence. It is an act or omission  
15          respecting legal duty of an aggravated character as distinguished from a  
16          mere failure to exercise ordinary care. It is very great negligence, or the  
17          absence of slight diligence, or the want of even scant care. It amounts to  
18          indifference to present legal duty, and to utter forgetfulness of legal  
19          obligations so far as other persons may be affected. It is a heedless and  
20          palpable violation of legal duty respecting the rights of others. The element  
21          of culpability which characterizes all negligence is, in gross negligence,  
22          magnified to a higher degree as compared with that present in ordinary  
23          negligence. Gross negligence is manifestly a smaller amount of watchfulness  
24          and circumspection than the circumstances require of a prudent man. But it  
25          falls short of being such reckless disregard of probable consequences as is  
26          equivalent to a willful and intentional wrong. Ordinary and gross negligence  
27          differ in degree of inattention, while both differ in kind from willful and  
28          intentional conduct which is or ought to be known to have a tendency to  
29          injure."  
30          *Id.* at 674.

31          In the instant case, no reasonable trier of fact would be able to determine that PHW  
32          acted with gross negligence, even if each of the criticisms raised by Braunstein were  
33          believed. The record, even when viewed in the light most favorable to Racine, establishes  
34          that PHW had security personnel on the premises, who were accessible to receive  
35          complaints from Alamsahebpour and Lee; that these security personnel met with both  
36          women and took statements from them; that PHW security personnel contacted LVMPD;  
37          and that PHW maintained video surveillance of the premises (#70). Racine has not

1 shown that PHW “fail[ed] to exercise even a slight degree of care.” Because no  
2 reasonable trier of fact would be able to find that PHW was grossly negligent, the Court  
3 will grant PHW’s motion for summary judgment as to this claim.

#### 4 Punitive Damages

5 The Nevada Supreme Court has held that punitive damages may be awarded only  
6 after “the district court makes a threshold determination that a defendant’s conduct is  
7 subject to this form of civil punishment.” *Countrywide Home Loans, Inc. v. Thitchener*, 124  
8 Nev. 725, 740 (2008). Thereafter, “the decision to award punitive damages rests entirely  
9 within the jury’s discretion.” *Id.* Under NRS 42.005, a plaintiff must demonstrate that a  
10 defendant has engaged in malice, oppression, or fraud, in order to seek punitive damages.

11 Under NRS 42.001, which defines each of those terms, malice includes both  
12 “express” malice, which is defined as having intent to injure a person, and “implied” malice,  
13 which is defined as a “conscious disregard of the rights or safety of others.” Oppression is  
14 similarly described as requiring a “conscious disregard” of a persons’ rights. Racine never  
15 alleged that Planet Hollywood acted with intent, so accusations of express malice are  
16 inapplicable. Moreover, the Nevada Supreme Court has held that “in defining what  
17 conduct would amount to conscious disregard . . . we conclude that NRS 42.001(1)  
18 denotes conduct that, at a minimum, must exceed mere recklessness or gross  
19 negligence.” *Id.* As this Court has already discussed, Racine’s claims do not rise to the  
20 level of gross negligence, so accusations of implied malice or oppression are also  
21 inapplicable.

22 Finally, Racine never alleged fraud within her complaint. Instead, she argues in her  
23 opposition that PHW committed fraud by attempting to replace one security report with a  
24 second, more detailed report during the discovery period. If Racine believes such an  
25 incident occurred, and amounted to fraud, then Racine must amend her complaint to  
26 include sufficient allegations to satisfy the particularity requirements of Rule 9(b). Without


1 such allegations, Racine cannot use fraud as the basis of her prayer for punitive damages.  
2 The Court accordingly makes a threshold determination that punitive damages will not be  
3 available in the instant case, and will therefore grant Planet Hollywood's motion for  
4 summary judgment as to this claim.

5 Therefore, for good cause shown,

6 THE COURT **ORDERS** that the Defendant's Motion for Summary Judgment (#75) is  
7 GRANTED;

8 THE COURT **ORDERS** that the Plaintiff's Motion for Summary Judgment (#71) is  
9 DENIED.

10 DATED this 2 day of <sup>Sept</sup> ~~August~~, 2014.

11  
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13 Lloyd D. George  
14 United States District Judge  
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